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OCT 26 1972

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In the Supreme Court of the United States

No. 72-641

OCTOBER TERM, 1972

UNITED STATES OF AMERICA,

Respondent,

v.

HILTON HOTELS CORPORATION, et al,

Defendants,

WESTERN INTERNATIONAL HOTELS COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming conviction of petitioner herein.

OPINION BELOW

Only the slip opinion of the Court of Appeals for the Ninth Circuit has been published. Such opinion is reproduced in Appendix A. No opinion was rendered by the United States District Court for the District of Oregon.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was filed and entered September 26, 1972. On October 19, 1972, the Court of Appeals for the Ninth Circuit filed an order staying issuance of mandate, pursuant to Rule 41(a) of Federal Rules of Appellate Procedure, pending the filing, consideration and disposition by this Court of a petition for a Writ of Certiorari provided such petition is filed on or before November 13, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether a corporation is criminally responsible for the action of menial employee which is in direct contravention of express instructions, given in good faith, immediately prior to the offending act.

STATUTORY PROVISIONS INVOLVED

The statutes involved are various sections of the antitrust laws. They are 15 U.S.C. §§ 1, 16 and 24. Because of their length, they are printed in Appendix B.

STATEMENT OF THE CASE

A.

Procedural Aspects

This is a criminal antitrust case. A grand jury indictment, charging violation of 15 U.S.C. § 1, was re-

turned against the Hilton Hotels Corporation; ITT Sheraton Corporation of America; Western International Hotels Company (herein petitioner); Cosmopolitan Investment, Inc.; Greater Portland Convention Association, Inc. (herein "GPCA") and the managers of the respective Oregon hotels.

Defendants entered pleas of not guilty, but subsequently each defendant, except petitioner and its Portland manager, Basil Miaullis, changed their pleas to *nolo contendere*. These pleas were accepted by the Court.

The case was tried to a jury as to the two remaining defendants. The jury returned a verdict of not guilty as to Basil Miaullis and a verdict of guilty as to petitioner.

An appeal to the Ninth Circuit was taken on behalf of petitioner and the judgment of conviction was affirmed.

B.

The Facts

The indictment charged that each defendant conspired to restrain interstate commerce by granting preferential treatment to, or threatening to curtail purchases from, hotel suppliers who failed to contribute to the GPCA (R. 6).

The GPCA, a nonprofit corporation, was founded to stimulate convention business in Portland, Oregon; to promote community support for conventions; and to

provide a means to fund similar activities by the Chamber of Commerce (R. 3, Tr. 235-236, 607-608). Its membership consisted of hotels, restaurants, suppliers and numerous other businesses and utilities located in and around Portland (R. 3).

Commencing in the early 1960's a schedule was devised to guide members in making contributions. Payment of dues was voluntary and the schedule was one which the Association hoped the business community would accept (Tr. 642, 816).

In 1969 a normal solicitation letter was sent. Portland Fish Company (herein Portland Fish) contributed a portion of the amount requested (Gov. Ex. 2). Subsequently the Association requested an additional contribution (Gov. Ex. 5). Portland Fish called the Association manager; used profanity to describe the Association; and demanded return of its initial contribution.

The conversation was reported to the board of the Association; it angered some members; and there was discussion of boycotting Portland Fish (Tr. 772-773, 776). Petitioner's representative at this meeting, Basil Miaullis, vigorously dissented (Tr. 649, 650, 652, 675, 772).

Miaullis was upset by the discussion. He described what had happened at the meeting to his executive assistant and to the purchasing agent and gave them specific instructions not to become involved in this or any type of boycott (Tr. 676-677, 407, 413). Receipt of these instructions was acknowledged by the pur-

chasing agent (Tr. 407, 412, 413). Less than two months later these instructions were again reiterated by Miaullis and his executive assistant to the purchasing agent (Tr. 686-687).

As applied to Portland Fish, it appears these instructions were followed (Tr. 593-594, 823). Unfortunately the purchasing agent violated these specific instructions with respect to another supplier (Tr. 393). He threatened a salesman with loss of commissions if the requested GPCA contributions were not made (Tr. 396). The statement was made out of personal pique and anger with no apparent intent to benefit petitioner (Tr. 408). The purchasing agent acknowledged in his testimony that in making such statement he was violating specific orders from management given shortly prior to the offending act (Tr. 407, 413).

Management testified that the hotel's policy was to give no preference to members of the GPCA and that no violations of such policy had come to their attention prior to the indictment (Tr. 534-536, 540, 594, 595, 656-658).

The trial court recognized that it was undisputed that petitioner had told the purchasing agent and everyone else in their employ not to engage in the practices (Tr. 834).

REASONS FOR GRANTING THE WRIT

Petitioner submits that the Ninth Circuit decision (a) conflicts with *John Gund Brewing Co.* v. *United States*, 204 F. 17 (8th Cir. 1913) and *Holland Furnace Co.* v. *United States*, 158 F.2d 2 (6th Cir. 1946); (b) raises an important and unsettled question with respect to corporate responsibility under the Sherman Act; and (c) reaches a result which has a substantial impact upon each corporation subject to the antitrust laws.

A.

Conflict with Decisions of Other Courts of Appeal

The decision of the Ninth Circuit in the instant case conflicts with the decisions rendered in *John Gund Brewing Co.* v. *United States*, 204 F. 17 (8th Cir. 1913) and with *Holland Furnace Co.* v. *United States*, 158 F.2d 2 (6th Cir. 1946).

The trial court instructed the jury as follows:

> "The corporation is responsible for acts and statements of its agents, that are made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies."

In determining the propriety of this instruction the Ninth Circuit held as follows:

> ". . . As a general rule, a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though

contrary to general corporate policy and express instructions to the agent."

This instruction and holding is in marked and irreconcilable conflict with the rule in *John Gund Brewing Co.* v. *United States*, 204 F. 17 (8th Cir. 1913). The Eighth Circuit held as follows:

"There is an irreconcilable conflict among the authorities on the question of whether a principal can be held liable criminally for the acts of his agent, acting within the scope of his apparent authority, but against the positive instructions of the principal, and of which violation the principal had no knowledge nor consented thereto. (citations omitted).

"We are of the opinion that while, in the absence of any explanatory evidence on the part of the defendant, the principal will be liable in a case of this nature where it is unnecessary to establish an unlawful intent on the part of the defendant for the acts of his agent within the apparent scope of his authority, the defendant may show that the agent acted not only without his knowledge and consent, either express or implied, *but in direct violation of express instructions given to him by the principal. Whether such instructions were given to him by the principal in good faith or whether by reason of the number of such illegal transactions by the agent, or the length of time he continued to disobey them and violate the law the principal must have had knowledge of the agent's unlawful acts and closed his eyes to them, are questions of fact which should be submitted to the jury under proper instructions.* (citations omitted)." (Emphasis added).

In the case of *Holland Furnace Co.* v. *United States*, 158 F.2d 2 (6th Cir. 1946), the Sixth Circuit announced a similar rule in a case arising under the War Production Board order, as follows:

> "In the case before us, the unlawful action of Boyd in procuring delivery of a furnace to Bowen has been shown, *with no evidence to the contrary, to have been not only without the knowledge of the appellate corporation of his illegal conduct, but also in express violation of its specific instructions to him and to all its agents. Under these circumstances, the conviction of the corporations should not be upheld.* Its motion for a directed verdict should have been granted." (Emphasis added).

Other circuits have been called upon to determine the standard for imposing criminal responsibility upon a corporation for the act of its agents. In none of these decisions has the Court, in the absence of a statute compelling a contrary result, imposed the degree of criminal responsibility mandated by the instruction to the jury and the holding of the Ninth Circuit in this case. For example, in *United States* v. *Armour & Co.*, 168 F.2d 342 (3rd Cir. 1947), the Court apparently believed it necessary to find violations of policy were sufficiently widespread so as to imply that the instructions were not given in good faith.

As the law is today, the substantial rights of a corporate defendant in an antitrust prosecution depend upon the circuit in which it is prosecuted. It may be found guilty in one and not guilty in others on the same facts.

B.

The Present Case Raises Important and Unsettled Questions with Respect to Corporate Responsibility under the Sherman Act

The Sherman Act has been in existence for eighty-two (82) years. During its entire history, the important question of the scope of corporate criminal responsibility under the Act has not been brought before this Court. Conflicting decisions within the circuits as to the criminal responsibility of a corporation; the well-founded principle that the standards for enforcement of criminal statutes should be uniform; and the importance of this issue to enforcement of the Sherman Act strongly suggest that this issue is ripe for authoritative determination.

The legislative history of the Sherman Act does not suggest that any careful consideration was given to this most important question. About all that can be said, with assurance, is that the concept of criminal responsibility for the acts of a sub-agent was not well settled in 1890. It is clear that it was the intent of Senator Sherman and of the Judiciary Committee of the Senate to simply codify existing common law as it had developed in the various states and in England and to provide specific remedies where there was a sufficient nexus to the commerce clause. 21 Cong. Rec. 3152 (1890).

Subsequent to the enactment of the Sherman Act, the United States Supreme Court determined that it was constitutional to impose criminal responsibility,

under the Elkins Act, upon a corporation, for the act of an agent. *New York Central and H. R. R. Co.* v. *United States*, 212 U.S. 418, 494-495, 29 S. Ct. 304 (1908). The Elkins Act specifically provided:

> "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company . . . shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person." 49 U.S.C. § 41(2).

In *John Gund Brewing Co.* v. *United States*, 204 F. 17 (8 Cir. 1913), the issue was as to the propriety of instructions imposing criminal liability upon a corporation. The Court held, under a law governing taxation upon wholesaler dealers of malt liquors, that the *New York Central and H. R. R. Co.* v. *United States*, supra, decision was not in point because the above-quoted language of the statute modified the common law and under the common law a corporate defendant was exonerated where there was a violation of positive instructions.

Against this backdrop, Congress reviewed the Sherman Act in connection with the passage of the Clayton Act. President Wilson admonished Congress as follows:

> "We ought to see to it, and the judgment of practical and sagacious men of affairs everywhere would applaud us if we do see to it, that penalties and punishment should fall not upon business itself, to its confusion and interruption, but upon

> the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn. Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible, and the punishment should fall upon them, not upon the business organization of which they make illegal use." 51 Cong. Rec. 9074 (1914).

In the process of considering the Clayton Act, there was general discussion of the nature of corporate responsibility for the criminal act of an agent. Consideration was given to provisions identical to the Elkins Act but this was rejected. 51 Cong. Rec. 9676 (1914).

Members of Congress were under the impression that the *ultra vires* act of an individual, one acting without authority, could not produce a conviction against a corporate employer. 51 Cong. Rec. 9676 (1914). It was the understanding of at least some members of the House of Representatives that a corporation could violate the antitrust laws solely through its "managing officer." 51 Cong. Rec. 9201 (1914).

This ambivalence with respect to the nature of the corporate criminal responsibility has been carried forward. For example in *Nobile* v. *United States*, 284 F. 253 (3rd Cir. 1922) a case arising under the National Prohibition Act, the Court stated:

> "Criminal liability of a principal or master for the act of his agent or servant does not extend so

far as his civil liability. He cannot be held criminally for the acts of his agent, contrary to his orders, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly. . . ."

The confusion surrounding this issue was further compounded by the government's assertion that the rule applicable to criminal cases under the Sherman Act is broader than the standard applied in civil cases (Tr. 840). It seems probable, however, that the rule applicable to a criminal case should either be identical to or less severe than the standard applied in a civil case. If it were otherwise, the salient purpose of 15 U.S.C. § 16 would be emasculated because it would be conceptually improper to permit a prior conviction against a corporation to constitute prima facie evidence in a civil proceeding.

In summary, the important questions of congressional intent; of the scope and standard for imposition of criminal liability under the Sherman Act; and of the relation of the Sherman Act to 15 U.S.C. § 16, make the issue presented here of such paramount significance that this Court should give concrete and clear guidance to the lower courts.

C.

The Decision Reaches a Result Which Affects Each Corporation Subject to the Antitrust Laws

That the issues have significance transcending the interests of the particular parties in this case is man-

ifest from the numerous inquiries which petitioner has received with respect to the background and scope of the decision. The standard of corporate responsibility for criminal action of a sub-agent under the Sherman Act has direct application to each corporation in this country. If liability is absolute and is to be imposed without regard to express contrary instructions, given in good faith, as to the specific subject matter, then this Court should announce that rule. On the contrary, if the standard, as urged by petitioner, permits a showing of good faith and of strenuous efforts to comply with the policies of the Sherman Act, business establishments in this country need a firm, authoritative guideline within which to govern their daily activities.

CONCLUSION

For the foregong reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
vs.	)	
HILTON HOTELS CORPORATION, et al., *Defendants,*	)	No. 71-1379
WESTERN INTERNATIONAL HOTELS COMPANY, *Defendant-Appellant.*	)	

[September 26, 1972]

Appeal from the United States District Court for the District of Oregon

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Before: BROWNING, HUFSTEDLER, and TRASK, Circuit Judges.

BROWNING, Circuit Judge:

This is an appeal from a conviction under an indictment charging a violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

Operators of hotels, restaurants, hotel and restaurant supply companies, and other businesses in Portland, Oregon, organized an association to attract conventions to their city. To finance the association, members were asked to make contributions in predetermined amounts. Companies selling supplies to hotels

were asked to contribute an amount equal to one percent of their sales to hotel members. To aid collections, hotel members, including appellant, agreed to give preferential treatment to suppliers who paid their assessments, and to curtail purchases from those who did not.

I

The jury was instructed that such an agreement by the hotel members, if proven, would be a per se violation of the Sherman Act. Appellant argues that this was error.

We need not explore the outer limits of the doctrine that joint refusals to deal constitute per se violations of the Act, for the conduct involved here was of the kind long held to be forbidden without more. "Throughout the history of the Sherman Act, the courts have had little difficulty in finding unreasonable restraints of trade in agreements among competitors, at any level of distribution, designed to coerce those subject to a boycott to accede to the action or inaction desired by the group or to exclude them from competition." Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 872-73 (1955); *see also* Report of the Attorney General's National Committee to Study the Antitrust Laws 133, 137 (1955). Familiar examples include *United States* v. *General Motors Corp.*, 384 U.S. 127, 145-47 (1966); *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 211-12 (1959); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457, 465 (1941); and *Eastern States*

Retail Lumber Dealers' Ass'n v. *United States*, 234 U.S. 600, 614 (1914).

Appellant argues that in these and other cases in which the per se rule has been applied to refusals to deal, the defendants intended "to destroy a competitor or a line of competition," while the purpose of the defendants in the present case "was solely to bring convention dollars into Portland." But the necessary and direct consequence of defendants' scheme was to deprive uncooperative suppliers of the opportunity to sell to defendant hotels in free and open competition with other suppliers, and to deprive defendant hotels of the opportunity to buy supplies from such suppliers in accordance with the individual judgment of each hotel at prices and on terms and conditions of sale determined by free competition. Defendants therefore "intended" to impose these restraints upon competition in the only sense relevant here. *See United States* v. *Griffith*, 334 U.S. 100, 105-06 (1948); *United States* v. *Patten*, 226 U.S. 525, 543 (1912). The ultimate objective they sought to achieve is immaterial. *Klor's* v. *Broadway-Hale Stores*, *supra*, 359 U.S. at 211-13. *See also Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 659-60 (1960); and *Fashion Originators' Guild* v. *FTC*, *supra*, 312 U.S. at 466-67.

Running through appellant's argument is the theme that the suppliers complied with the urgings of the hotels to contribute because they wished to maintain friendly business relations with these important customers; that this sort of "coercion," and

submission to it, is common in American business life, and should not be subject to the Sherman Act unless it is shown that in the particular case it was intended to have, or had, an unreasonable impact upon price, quality, or service.

If the argument is that the evidence did not show an agreement on the part of the hotels to prefer suppliers who paid their contribution over those who did not, we reject it on the ground that the evidence was clearly sufficient to establish such an agreement. If the argument is that such use by the defendant hotels of their combined economic power to coerce suppliers violates the Sherman Act only if price, service, or quality is adversely affected, we reject it on the authority of *Klor's* v. *Broadway-Hale Stores, supra*, 359 U.S. at 212.

Appellant argues that since the suppliers were also members of the association, the per se rule is inapplicable because "the request for contribution and the alleged coercive action was among members of the same association" and the "implied threat of coercion or preference can be said simply to be an incidental effect of regulations within the group inter se."

The circumstances that both the boycotters and their victims were members of the same trade association would not diminish the impact of the boycott on competition, and appellant does not explain why it should affect the legality of the boycott. This same factual circumstance appears to have been present, for example, in *Fashion Originators' Guild* v. *FTC, supra*, 312 U.S. at 461.

The evidence does not show that the suppliers joined in the agreement that the hotels would cease dealing with those that failed to pay, but the result would not be changed if it had. It is not the primary purpose of the Sherman Act to protect deserving private persons, but to vindicate the public interest in a free market.[1] *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1956); *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174 (1915).

This is not a case in which joint activity having a primary purpose and direct effect of accomplishing a legitimate business objective is also alleged to have had an incidental and indirect adverse effect upon the business of some competitors. *See, for example, Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Bridge Corp. of America* v. *American Contract Bridge League*, 428 F.2d 1365 (9th Cir. 1970); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquor Ltd.*, 416 F.2d 71 (9th Cir. 1960); *Deeson* v. *Professional Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir. 1966).[2] The primary purpose and direct effect of defendants' agreement was to bring the combined economic power of the hotels to bear upon those

[1] This is also a sufficient answer to appellant's objection to the court's instruction that a boycott would violate the Sherman Act "even if the boycott . . . resulted from a personal quarrel." *Cf. Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 210 (1959).

[2] Of course, such conduct is not necessarily exonerated; it is tested under the "rule of reason." *See generally* Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 Duke L. J. 247, 270-73 (1970).

suppliers who failed to pay. The exclusion of uncooperative suppliers from the portion of the market represented by the supply requirements of the defendant hotels was the object of the agreement, not merely its incidental consequence.

II

Appellant's president testified that it would be contrary to the policy of the corporation for the manager of one of its hotels to condition purchases upon payment of a contribution to a local association by the supplier. The manager of appellant's Portland hotel and his assistant testified that it was the hotel's policy to purchase supplies solely on the basis of price, quality, and service. They also testified that on two occasions they told the hotel's purchasing agent that he was to take no part in the boycott. The purchasing agent confirmed the receipt of these instructions, but admitted that, despite them, he had threatened a supplier with loss of the hotel's business unless the supplier paid the association assessment. He testified that he violated his instructions because of anger and personal pique toward the individual representing the supplier. *See* note 1.

Based upon this testimony, appellant requested certain instructions bearing upon the criminal liability of a corporation for the unauthorized acts of its agents. These requests were rejected by the trial court. The court instructed the jury that a corporation is liable for the acts and statements of its agents "within the scope of their employment," defined to

mean "in the corporation's behalf in performance of the agent's general line of work," including "not only that which has been authorized by the corporation, but also that which outsiders could reasonably assume the agent would have authority to do." The court added:

> "A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies."

Appellant objects only to the court's concluding statement.

Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment. *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 125-26 (1958); *New York Central & Hudson R.R.* v. *United States*, 212 U.S. 481 (1909); *cf. United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938). Such liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions. *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970). *See also New York Central & Hudson R.R.* v. *United States*, *supra*, 212 U.S. at 493; *Standard Oil Co.* v. *United States*, 307 F.2d 120, 127-28 (5th Cir. 1962); *United States* v. *Armour & Co.*, 168 F.2d 342, 343-44 (3d Cir. 1947); *Egan* v. *United States*, 137 F.2d 369 (8th Cir. 1943); 10 Fletcher, Cyclopedia of the Law of Private Corporations 492 (M. Wolf ed. 1970).

The intention to impose such liability is sometimes express, *New York Central & Hudson R.R.* v. *United States*, *supra*, 212 U.S. 481, but it may also be implied. The text of the Sherman Act does not expressly resolve the issue. For the reasons that follow, however, we think the construction of the Act that best achieves its purpose is that a corporation is liable for acts of its agents within the scope of their authority even when done against company orders.

It is obvious from the Sherman Act's language and subject matter that the Act is primarily concerned with the activities of business entities. The statute is directed against "restraints upon commercial competition in the marketing of goods or services." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940). In 1890, as now, the most significant commercial activity was conducted by corporate enterprises. *See New York Central & Hudson R.R.* v. *United States*, *supra*, 212 U.S. at 495; *Regan* v. *Kroger Grocery & Baking Co.*, 54 N.E.2d 210, 219 (S.C. Ill. 1944).

Despite the fact that "the doctrine of corporate criminal responsibility for the acts of the officers was not well established in 1890," *United States* v. *Wise*, 370 U.S. 405, 408 (1962), the Act expressly applies to corporate entities. 15 U.S.C. § 7. The preoccupation of Congress with corporate liability was only emphasized by the adoption in 1914 of section 14 of the Clayton Act to reaffirm and emphasize that such lia-

bility was not exclusive, and that corporate agents also were subject to punishment if they authorized, ordered, or participated in the acts constituting the violation. *United States* v. *Wise*, *supra*, 370 U.S. at 411-15.

Criminal liability for the acts of agents is more readily imposed under a statute directed at the prohibited act itself, one that does not make specific intent an element of the offense. *See Standard Oil Co.* v. *United States*, *supra*, 307 F.2d at 125; *cf. Empire Printing Co.* v. *Roden*, 247 F.2d 8, 17 (9th Cir. 1957); Note, Corporate Criminal Liability for Acts in Violation of Company Policy, 50 Geo. L. J. 547, 562 (1962); Perkins on Criminal Law 638, 640 (2d ed. 1969). The Sherman Act is aimed at consequences. Specific intent is not an element of any offense under the Act except attempt to monopolize under section 2, and conscious wrongdoing is not an element of that offense. The Sherman Act is violated if "a restraint of trade or monopoly results as the consequences of a defendant's conduct or business arrangements." *United States* v. *Griffith*, *supra*, 334 U.S. 100, 105 (1948). *See* Whiting, Antitrust and the Corporate Executive, 47 Va. L. Rev. 929, 934 (1961); Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 937 n. 94 (1959); Note, *supra*, 50 Geo. L. J. 547, 558 n. 61.

The breadth and critical character of the public interests protected by the Sherman Act, and the gravity of the threat to those interests that led to the en-

actment of the statute, support a construction holding business organizations accountable, as a general rule, for violations of the Act by their employees in the course of their businesses. In enacting the Sherman Act, "Congress was passing drastic legislation to remedy a threatening danger to the public welfare. . . ." *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 392 (1922). The statute "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Ry.* v. *United States, supra*, 356 U.S. at 4.

With such important public interests at stake, it is reasonable that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act. *See* Note, *supra*, 50 Geo. L.J. 547, 558; Note, 60 Harv. L. Rev. 283, 285-86, 289 (1946). *See also United States* v. *A & P Trucking Co., supra*, 358 U.S. at 126; *United States* v. *George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946); *United States* v. *Armour & Co., supra*, 168 F.2d at 344; *Re-*

gan v. *Kroger Grocery & Baking Co.*, *supra*, 54 N.E.2d at 220.

Legal commentators have argued forcefully that it is inappropriate and ineffective to impose criminal liability upon a corporation, as distinguished from the human agents who actually perform the unlawful acts (*see* Francis, Criminal responsibility of the Corporation, 18 Ill. L. Rev. 305 (1924); Canfield, Corporate Responsibility for Crime, 14 Colum. L. Rev. 469 (1914), particularly if the acts of the agents are unauthorized. *See* Mueller, Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21, 45 (1957). But it is the legislative judgment that controls, and "the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy." ALI Model Penal Code, Comment on § 2.07, Tentative Draft No. 4, p. 149 (1956). Moreover, the strenuous efforts of corporate defendants to avoid conviction, particularly under the Sherman Act, strongly suggests that Congress is justified in its judgment that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent violations by employees. Note, *supra*, 60 Harv. L. Rev. 283, 286.

Because of the nature of Sherman Act offenses and the context in which they normally occur, the factors that militate against allowing a corporation to disown the criminal acts of its agents[3] apply with

[3] *See generally* Sutherland, White Collar Crime, 53-54,

special force to Sherman Act violations.

Sherman Act violations are commercial offenses. They are usually motivated by a desire to enhance profits.[4] They commonly involve large, complex, and highly decentralized corporate business enterprises, and intricate business processes, practices, and arrangements. More often than not they also involve basic policy decisions, and must be implemented over an extended period of time.

Complex business structures, including decentralization and extensive delegation of authority, adopted by corporations for business purposes, make it difficult to identify the particular corporate agents responsible for Sherman Act violations. At the same time, it is generally true that high management officials, for whose conduct the corporate directors and stockholders are the most clearly responsible, are likely to have participated in the policy decisions underlying Sherman Act violations, or at least to have become aware of them.

Violations of the Sherman Act are a likely conse-

217-20, 229-33 (1949); ALI Model Penal Code Comment on § 207, Tentative Draft No. 4, 148-49 (1955); Watkins, Electrical Equipment Antitrust Cases—Their Implications for Government and for Business, 29 U. Chi. L. Rev. 97, 105-06 (1961); Comment, Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy, 48 Geo. L. J. 530, 538-41 (1965); Note, Corporate Criminal Liability for Acts in Violation of Company Policy, 50 Geo. L. J. 547, 552-54 (1962).

[4] A purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment. *Standard Oil Co.* v. *United States*, 307 F.2d 120, 128-29 (5th Cir. 1962).

quence of the pressure to maximize profits that is commonly imposed by corporate owners upon managing agents and, in turn, upon lesser employees. In the face of that pressure, generalized directions to obey the Sherman Act, with the probable effect of foregoing profits, are the least likely to be taken seriously. And if a violation of the Sherman Act occurs, the corporation, and not the individual agents, will have realized the profits from the illegal activity.

In sum, identification of the particular agents responsible for a Sherman Act violation is especially difficult, and their conviction and punishment is peculiarly ineffective as a deterrent. At the same time, conviction and punishment of the business entity itself is likely to be both appropriate and effective.

For these reasons we conclude that as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.

Thus the general policy statements of appellant's president were no defense. Nor was it enough that appellant's manager told the purchasing agent that he was not to participate in the boycott. The purchasing agent was authorized to buy all of appellant's supplies. Purchases were made on the basis of specifications, but the purchasing agent exercised complete authority as to source. He was in a unique position to add the corporation's buying power to the force of the boycott. Appellant could not gain exculpation by

issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks.

III

Appellant filed two motions requesting disclosure of the grand jury transcript. The first sought production of the testimony of all of the witnesses who appeared before the grand jury, the second sought the testimony of appellant's past and present employees. Assuming the court erred in denying the motions, the error was harmless.

According to appellant, the grand jury testimony of four witnesses was involved. Appellant was given a transcript of the testimony of one of the witnesses a week prior to trial, and of another during the trial at the latest. Appellant has suggested no respect in which the delay between the making of the motions and the delivery of the transcript as to these two witnesses could have prejudiced its defense, and none is apparent.

The other two grand jury witnesses were former employees of appellant. Neither was called as a witness by either side. Government supplier witnesses did testify to statements made by these two employees that indicated a refusal to deal with suppliers who failed to pay association assessments. These witnesses were available for cross-examination, and presumably transcripts of their grand jury testimony had been made available to appellant a week prior to trial pur-

suant to the court's order applicable to all government witnesses.

The most that appellant could have learned from access to the grand jury testimony of its two employees was that they had denied making the statements attributed to them. One would suppose that appellant could discover if this were true simply by asking the witnesses themselves; they would have had no reason to deny it. Appellant informed the district court, however, that one of the employee witnesses, its former chef, had gone to Switzerland. Appellant's claim of prejudice rests finally upon this witness' absence.

Appellant did not represent to the trial court, nor to us, that it would have had the slightest difficulty locating the witness. So far as appears, it made no effort to contact him at all. All that appellant asserted to the trial court was that access to the witness' grand jury testimony would have enabled it to determine whether it would have been worth its while to make such an effort.

The witness' testimony could have consisted of no more than a denial of the statement attributed to him by the supplier witness. That statement was a relatively innocuous one. Certainly in the context of the whole record, it could not have influenced the verdict. Thus, even if denial of appellant's motion for a copy of the transcript of the witness' testimony were treated as tantamount to denying appellant the benefit of the witness' trial testimony, the error, if any, would be harmless. *See Osborne* v. *United States*, 371

F.2d 913, 919 (9th Cir. 1967); *Ogden* v. *United States*, 303 F.2d 724, 740-41 (9th Cir. 1962); *cf. Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946).

IV

Appellant asserts that the evidence connecting appellant with the conspiracy was not sufficient.

The argument rests largely upon three erroneous premises of law.

The first is that because of the acquittal of appellant's manager, evidence connecting him with the conspiracy cannot be considered against appellant. Acts and statements of appellant's employees within the scope of their employment bind appellant. *See* Part II. It makes no difference whether such acts and statements are sufficient to convict the employee of participation in the conspiracy. A fortiori, it is irrelevant that the employee was charged with the offense and acquitted. *United States* v. *American Stevedore, Inc.*, 310 F.2d 47, 48-49 (2d Cir. 1962); *Magnolia Motor & Logging Co.* v. *United States*, 264 F.2d 950, 953 (9th Cir. 1959); *United States* v. *General Motors Corp.*, 121 F.2d 376, 411 (7th Cir. 1941); *United States* v. *Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929).

Secondly, appellant erroneously asserts that the acts and statements of appellant's purchasing agent did not bind appellant because they were contrary to express instructions. *See* Part II.

Finally, appellant asks us to test the sufficiency

of the evidence by inquiring whether 'reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt." *Remmer* v. *United States*, 205 F.2d 277, 288 (9th Cir. 1953). We specifically rejected this standard in *United States* v. *Nelson*, 419 F.2d 1237, 1243-45 (9th Cir. 1969). The question is whether the fact-finder could reasonably conclude that defendant's guilt was free of the kind of doubt that would make a person hesitate to act in the more serious and important affairs of his life.

We have examined the government's evidence in light of this standard and conclude that it is sufficient.[3]

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[3] We have also considered appellant's objections to the trial court's treatment of testimony regarding statements made by appellant's chef, at a time outside the period of the statute of limitations, and the court's instructions concerning illegal activities of an association originally organized for a proper purpose. We conclude that no reversible error occurred.

Affirmed.

APPENDIX B

15 U.S.C. § 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each

other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 16. *Judgment in favor of Government as evidence; suspension of limitations.*

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said

proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 24. *Liability of directors and agents of corporation.*

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

APPENDIX C

The jury was instructed as follows:

"A corporation is legally responsible for the actions done and the statements made by its agents within the scope of their employment. Acts or statements within an agent's scope of employment are those done or made in the corporation's behalf in performance of the agent's general line of work. Conduct within the agent's scope of employment includes not only that which has been authorized by the corporation, but also that which outsiders could reasonably assume the agent would have authority to do, judging from his position within the corporation, the responsibilities previously entrusted him and circumstances surrounding his past conduct.

"A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policy." (Tr. 877-878).

APPENDIX D

"A number of defendants named in the indictment, including defendant Western International Hotels Company, are corporations. Although a corporation is considered in law a person, it can act or speak only through its officers, directors, employees or other agents.

"A corporation cannot be held criminally responsible for the acts of its employees, or agents, which are contrary to its orders, and without au-

thority, express or implied, merely because it is in the course of the corporate business and within the scope of the employment.

"Nobile v. United States, 284 Fed. 253 (1922)."

Defendants' Requested Instruction No. 25 (R. 305)

APPENDIX E

The trial court, prior to being persuaded to the contrary, intended to give the following instruction on this issue:

" 'If you find that an employee of the Benson Hotel committed acts charged in the indictment, but such acts were in violation of directives, orders, instructions, or policies of Western to the contrary, such acts would not of themselves make Western International Hotels liable in this case.' (Tr. 833)

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-641

WESTERN INTERNATIONAL HOTELS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-31) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1972. The petition for a writ of certiorari was filed on October 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a corporation may be held criminally responsible under the antitrust laws for the conduct

of its agents within the actual, implied and apparent scope of their employment, even though that conduct may be contrary to the corporation's actual instructions or to its stated policies.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the antitrust laws, 15 U.S.C. 1, 16 and 24, are set forth at Pet. App. 32–34. In addition, Section 8 of the Sherman Act, 26 Stat. 210, 15 U.S.C. 7, provides:

> The word "person", or "persons", whenever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

STATEMENT

The Greater Portland Convention Association (GPCA) was organized in 1959 to aid the Chamber of Commerce of Portland, Oregon, in attracting conventions to the city (Pet. 3–4). Its members included operators of hotels, restaurants, hotel and restaurant supply companies, and similar businesses in and around Portland (Pet. 4). The association was financed by contributions requested from its members according to a formula whereby hotel supply companies were assessed an amount equal to one percent of their sales to hotel members (Pet. App. 15–16).

A grand jury indictment charging violation of Section 1 of the Sherman Act (15 U.S.C. 1) was returned against petitioner and three other firms, all of which

operate hotels in Portland, and the managers of those hotels. The indictment charged them with conspiring to restrain interstate commerce by granting preferential treatment to suppliers who paid their GPCA assessments, and by threatening to curtail purchases from those who did not (Pet. 3). The defendants originally pleaded not guilty, but subsequently each defendant, except petitioner and its Portland manager, changed their pleas to *nolo contendere*.

The criminal antitrust charges as to the two remaining defendants were tried to a jury. During the trial, petitioner's president testified that it would be contrary to corporate policy to condition purchases upon payment of a contribution to a local association by the supplier. The Portland manager and his assistant testified that it was the hotel's policy to purchase supplies solely on the basis of price, quality and service and that on two occasions they instructed the hotel's purchasing agent that he was not to become involved in any type of boycott. The purchasing agent confirmed the receipt of these instructions, but admitted that, despite them, he had threatened a supplier with loss of the hotel's business unless the supplier paid the GPCA assessment. He testified that he violated his instructions because of anger and personal pique toward the individual representing the supplier (Pet. App. 20).

Petitioner's request, based on this testimony, for instructions absolving it from criminal liability for the unauthorized acts of its agents (Pet. App. 35–36) was denied. Instead, the court instructed the jury

(Pet. App. 35) that a corporation is liable for the actions of its agents "within the scope of their employment," which it defined to include acts within the agents' actual, implied, or apparent authority. The court added that (*ibid.*) a corporation is responsible for acts and statements of its agents done or made within the scope of their employment, "even though [the agents'] conduct may be contrary to their actual instructions or contrary to the corporation's stated polic[ies]."

The jury found petitioner guilty but its Portland manager not guilty. Petitioner was fined $10,000 plus the costs of prosecution. The court of appeals unanimously affirmed. Based upon the authorities and the policy justifications for corporate criminal responsibility under the antitrust laws (Pet. App. 20–28), it concluded that "as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent" (Pet. App. 27).

ARGUMENT

This case presents no question warranting review by this Court. The legislative purpose embodied in the Sherman Act requires that a corporation be legally responsible for the actions of its agents taken in the interest of the corporation, and within their actual or apparent authority, even though contrary to general corporate policy or express instructions. There is no conflict among the courts of appeals.

There is no occasion here to consider whether, as a general matter, a corporation may be held criminally responsible for the illegal acts of its agents in its behalf. Criminal statutes imposing liability on corporations are numerous and varied. Since corporations can only act through agents, concepts of corporate criminal responsibility for such acts are shaped by the policies of the particular statute imposing that responsibility. Where regulation of business activity is the primary legislative purpose, the offense is merely a misdemeanor and specific intent is not an element, the standard of corporate responsibility obviously must be strict if the statute is to be an effective deterrent to corporate misconduct.

The Sherman Act, of course, is primarily concerned with the commercial activities of business entities. In 1890 the corporation was, as it is now, the most significant mode of commercial enterprise. See *New York Central & Hudson R.R.* v. *United States*, 212 U.S. 481, 495; *Regan* v. *Kroger Grocery & Baking Co.*, 54 N.E. 2d 210, 219 (S.Ct. Ill.) Since specific intent is not an element of an offense under Section 1,[1] the corporation may be held criminally responsible for its agents' act in its behalf even though there has not been specific authorization, toleration or ratification of those acts. See *Standard Oil Company of Texas* v. *United States*, 307 F. 2d 120, 125 (C.A. 5).

[1] *United States v. Griffith*, 334 U.S. 100, 105; *United States* v. *Paramount Pictures*, 334 U.S. 131, 173; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522; *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614.

This principle is simply a realistic reflection of modern business conditions. Corporations characteristically conduct their affairs through complex business structures involving extensive delegation of authority. They exert great pressure upon their managing agents to maximize profits. This, in turn, may encourage highly profitable, but illegal, conduct that suppresses competition in the interest of the corporation. The immediate fruits of such violations inure to the benefit of the corporate entity, not the individual agent. As this Court has declared, "The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment." *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126. Thus, it is reasonable and appropriate that the corporation should also share the responsibility.

This Court has many times recognized the important public interest protected by the Sherman Act. See *e.g.*, *United States* v. *Topco Associates*, 405 U.S. 596; *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1. The criminal provisions of the Act play a vital deterrent role in safeguarding the public from the most pernicious forms of injury, such as price fixing and other naked restraints of trade. This deterrent effect depends upon the possibility of *both* individual and corporate liability.

It is not a sufficient deterrent to rely only on remedies against individual agents, particularly where, as under the Sherman Act, the offense is only a misdemeanor and penalties actually imposed on individuals

tend to be relatively light. The threat of individual conviction in such circumstances may be ineffective because of the strong economic pressures within the corporation on the individual to maximize profits, and the fact that an offense under the Sherman Act often does not involve behavior which is condemned as highly immoral by the individual's associates. Furthermore, juries recognize that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendant and are therefore often reluctant to hold him responsible for acts as to which his corporation was the principal beneficiary.[2] On the other hand, few individuals are willing to jeopardize their business careers by engaging in acts for which their corporate employer may be held criminally responsible even if the individuals are not. To a corporation which values its goodwill, as well as to its agents, therefore, the threat of conviction and fine for the agents' misconduct can have a deterrent effect far greater than the often remote possibility of individual liability.

A rule limiting corporate responsibility to cases of actual authorization or ratification, or gross negligence in supervision would greatly impair the Sherman Act's effectiveness. Merely by issuing general expressions of policy and instructions to its agents, a corporation could effectively insulate itself from all responsibility. For example, the purchasing agent involved here was granted broad authority by petitioner

[2] See ALI Model Penal Code, Comments on § 2.07, Tentative Draft No. 4, p. 149 (155).

to purchase supplies. He was also directed by petitioner's managing agent actively to solicit suppliers to pay their G.P.C.A. assessments. He was, therefore, in a unique position to add the corporation's buying power to the force of the boycott.[2] As the court below stated, "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks" (Pet. App. 27–28).

Two courts of appeals have directly considered the issue herein presented. *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 149–151 (C.A. 6); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204–205 (C.A. 3), certiorari denied, 401 U.S. 948. Each case involved the conviction of a corporation under Section 1 of the Sherman Act. In each case, the corporation had issued policy statements and instructions to its agents which it claimed absolved it from responsibility. However, in each case the conviction was upheld and jury instructions prac-

[2] No indictment was brought against the purchasing agent here involved. However, this fact in no way affects the corporation's criminal responsibility. *United States* v. *Van Allen*, 28 F.R.D. 329, 345 (S.D.N.Y.); *United States* v. *Detroit Sheet Metal & Roofing Contractors Ass'n*, 116 F. Supp. 81, 91 (E.D. Mich.). Nor does the acquittal of the managing agent provide petitioner any defense. *Magnolia Motor & Logging Co.* v. *United States*, 264 F. 2d 950, 953 (C.A. 9); *Southern Advance Bag & Paper Co.* v. *United States*, 133 F. 2d 449, 450–451 (C.A. 5). See *United States* v. *Dotterweich*, 320 U.S. 277, 279; *Dunn* v. *United States*, 284 U.S. 390, 393; Final Report of the National Commission on Reform of Federal Criminal Laws § 402(2); 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 172 (1970).

tically identical to the ones petitioner here attacks were specifically approved.[4]

John Gund Brewing Co. v. *United States*, 204 Fed. 17 (C.A. 8); *Holland Furnace Co.* v. *United States*, 158 F. 2d 2 (C.A. 6), and *Nobile* v. *United States*, 284 Fed. 253 (C.A. 3), relied on by petitioner, are not in conflict. The language of the Third Circuit in the *Nobile* case (Pet. 11), was only a dictum which the same court subsequently rejected in *United States* v. *Armour & Co.*, 168 F. 2d 342, 344, n. 2. In *Holland Furnace*, the court of appeals dealt with a statute that specifically made "reasonable reliance" and good faith a complete defense. The court made clear that its

[4] In non-Sherman Act contexts, several other courts of appeals have held that instructions to agents or general expressions of policy cannot shield a corporation from criminal responsibility for the actions of its agents within the scope of their employment. *United States* v. *Armour & Co.*, 168 F. 2d 342, 343 (C.A. 3); *C.I.T. Corporation* v. *United States*, 150 F. 2d 85, 89 (C.A. 9); *Egan* v. *United States*, 137 F. 2d 369, 379 (C.A. 8), certiorari denied, 320 U.S. 788. It has been suggested that the general rule under existing federal law "purports to authorize liability for the act of any agent of the corporation within the area of duties or functions entrusted to him, at least if he is acting in furtherance of, rather than against, the interest of the corporation." 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 164 (1970). See, also, New York Penal Law § 20.20, subd. (2) (c). This standard appears to differ from the American Law Institute's draft Model Penal Code, 1 Working Papers, *supra* at 172. Compare ALI Model Penal Code, Proposed Official Draft § 2.07 (1962). Even under the draft Code, however, the defense that the corporation's managing agents exercised due diligence to prevent the offense is not available "if plainly inconsistent with the legislative purpose in defining the particular offense." § 2.07(5). We submit that this is the case under the Sherman Act.

decision turned largely *"on the facts of this case"* (158 F. 2d at 8, emphasis in original), which differ significantly from the facts here. Whatever support *Holland Furnace* might have provided to petitioner's position disappears in light of the Sixth Circuit's more recent opinion in *Continental Baking Co.* v. *United States, supra,* which involved almost the identical question of corporate responsibility presented here and reached the same result.

The Eighth Circuit's 1913 decision in *John Gund Brewing Co., supra,* involved a statute far different from the Sherman Act. A corporation was convicted of selling malt liquor in a particular town without a government license, based on shipments its agent had made to fictitious consignees there. The corporation was not permitted to show that the shipments violated its express instructions. The court of appeals reversed and remanded for a new trial. It held even though the statute did not require a showing of unlawful intent by the corporation for acts of its agent within the scope of his authority, the corporation could nevertheless show that the agent had violated its good faith instructions.

While the court used broad language, its holding turned on the particular statute and conduct in issue. This may be seen by comparing *Gund* with the Eighth Circuit's later decision in *Egan* v. *United States,* 137 F. 2d 369, 379, certiorari denied, 320 U.S. 788, which held a corporation liable, without regard to its policies and instructions, for illegal political contributions by its agent. Moreover, *Gund* was decided at a time

when corporate criminal responsibility was still relatively new to federal jurisprudence. The opinion relied solely on decisions of state courts, which it characterized as being in irreconcilable conflict. Since 1913, federal law on the question of corporate criminal responsibility has fully developed. See, *supra*, p. 9, n. 4.

Under the Sherman Act, the corporation's criminal responsibility for acts of its agent arises not out of *respondeat superior* alone, but also out of the corporation's obligations under the statute to the public. Private instructions by a corporation to its agent do not affect the apparent authority upon which the public must rely. Nor, as we have shown, are they as effective as the threat of corporate criminal responsibility in deterring violations of the Sherman Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972